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## Abuseman bin Jamaluddin v Etiqa Takaful Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO Q-02(A)-2351–11 OF 2017
BADARIAH SAHAMID, RHODZARIAH BUJANG AND NOR BEE JJCA
9 JULY 2020

C

*Road Traffic — Insurance — Judgment against insured by third party — Applicant as insurer obtained declaration that insurance policy was void and unenforceable — Whether second respondent's third party statutory rights disentitled by declaration — Whether s 96 should be read with s 94 of Road Transport Act 1987 — Road Transport Act 1987 ss 94 & 96*

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This was an appeal against the High Court's decision in allowing Etiqa Takaful Bhd's ('the applicant') application for a declaration that the contract of insurance ('the policy') which covered a car was void and unenforceable in respect of coverage of an accident which allegedly occurred between the car and a motorcycle. The applicant was the insurer of the policy in respect of the car while Ambrose ak Jewon ('the first respondent') was the registered owner and driver of the car insured by the policy which was issued by the applicant. Abuseman bin Jamaluddin ('the second respondent') was the rider of the motorcycle who had sustained severe injuries due to an accident involving the first respondent. The second respondent had commenced a civil suit against the first respondent at the sessions court to claim for general and special damages arising out of the alleged accident. Meanwhile, the applicant filed an originating summons in the High Court which sought, inter alia: (a) the declarations that the policy was void and unenforceable to cover the accident; and (b) the applicant was not responsible to comply with any orders following the civil action in the sessions court and/or any other claims which arose from the road accident. The learned judge allowed the application. In this appeal by the second respondent against the applicant, it was contended that such a declaration would disentitled the second respondent of his third-party statutory rights under s 96(1) of the Road Transport Act 1987 ('the RTA 1987').

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**Held**, allowing the appeal and setting aside the order of the High Court:

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(1) Section 96 of the RTA 1987 must be read together with s 94 of the RTA 1987. In addition, there was no express provision to stipulate that s 94 of the RTA 1987 was subjected to s 96 of the RTA 1987. Section 94 of the RTA 1987 strictly prohibited the applicant from repudiating its liability

to the second respondent on the grounds that the insured ie first respondent had breached specific conditions of the insurance policy. Consequently, the second respondent could proceed to execute his rights under s 96(1) of the RTA 1987 and claim against the applicant. Thus the second respondent's statutory rights under s 96(1) of the RTA 1987 was fully preserved notwithstanding the declaratory order of the High Court against the first respondent. The learned judge had erred in law in her failure to consider the provision of s 94 of the RTA 1987 which disentitled the applicant from obtaining the benefit of the said declaration order against the second respondent (see paras 31 & 37–38).

**[Bahasa Malaysia summary**

Ini adalah rayuan terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan Etiqa Takaful Bhd ('pemohon') untuk perisytiharan bahawa kontrak insurans ('polisi') yang menanggung sebuah kereta adalah tidak sah dan tidak dapat dilaksanakan berkenaan dengan tanggungan kemalangan yang didakwa berlaku antara kereta tersebut dan satu motosikal. Pemohon adalah penanggung insurans polisi berkenaan kereta manakala Ambrose ak Jewon ('responden pertama') adalah pemilik dan pemandu kereta yang didaftarkan yang diinsuranskan oleh polisi yang dikeluarkan oleh pemohon. Abuseman bin Jamaluddin ('responden kedua') adalah penunggang motosikal yang mengalami kecederaan parah akibat kemalangan yang melibatkan responden pertama. Responden kedua telah menuntut saman sivil terhadap responden pertama di mahkamah sesyen untuk menuntut ganti rugi am dan khas yang timbul akibat kemalangan yang didakwa. Sementara itu, pemohon memfailkan saman pemula di Mahkamah Tinggi yang memohon, antara lain: (a) perisytiharan bahawa polisi tidak sah dan tidak dapat dilaksanakan untuk menanggung kemalangan; dan (b) pemohon tidak bertanggungjawab untuk mematuhi sebarang perintah berikutan tindakan sivil di mahkamah sesyen dan/atau tuntutan lain yang timbul dari kemalangan jalan raya tersebut. Hakim yang bijaksana membenarkan permohonan itu. Dalam rayuan ini oleh responden kedua terhadap pemohon, dikatakan bahawa perisytiharan seperti itu akan membebaskan responden kedua hak undang-undang pihak ketiga di bawah s 96(1) Akta Pengangkutan Jalan 1987 ('APJ 1987').

**Diputuskan**, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Seksyen 96 APJ 1987 mesti dibaca bersama dengan s 94 APJ 1987. Di samping itu, tiada peruntukan nyata untuk menetapkan bahawa s 94 APJ 1987 tertakluk kepada s 96 APJ 1987. Seksyen 94 APJ 1987 dengan tegas melarang pemohon untuk menolak tanggungjawabnya kepada responden kedua dengan alasan bahawa yang diinsuranskan iaitu responden pertama telah melanggar syarat-syarat khusus polisi insurans. Dengan itu, responden kedua dapat meneruskan haknya di bawah s

96(1) APJ 1987 dan menuntut terhadap pemohon. Oleh itu, hak undang-undang responden kedua di bawah s 96(1) APJ 1987 terpelihara sepenuhnya walau pun perintah deklarasi Mahkamah Tinggi terhadap responden pertama. Hakim yang bijaksana telah terkhilaf dari segi undang-undang kerana tidak mempertimbangkan peruntukan s 94 APJ 1987 yang tidak membenarkan pemohon mendapatkan manfaat perintah deklarasi tersebut terhadap responden kedua (lihat perenggan 31 & 37–38).]

**Cases referred to**

*Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223, CA (refd)
*Jayakumar Rajoo Mohamad v CIMB Aviva Takaful Bhd* [2015] 6 MLJ 437; [2015] 9 CLJ 552, CA (refd)
*Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165, SC (refd)
*Muhamad Haqimie bin Hasim & Anor v Pacific & Orient Insurance Co Bhd* [2018] MLJU 629, CA (refd)
*Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218, CA (refd)

**Legislation referred to**

Insurance Act 1966 (repealed by the Financial Services Act 2013)
Road Traffic Ordinance 1958 (repealed by Road Transport Act 1987) ss 80, 80(4)
Road Transport Act 1987 ss 91(4), 94, 96(1), (2), (3)

**Appeal from**: Originating Summons No KCH-24–24/3 of 2017 (High Court, Kuching)

*Sarbjit Singh Khaira (Catherine David with him) (Khaira & Co) for the appellant.*
*Allan Lao (Shally Heng and David John Au with him) (David Allan Sagah & Teng Advocates) for the respondent.*

**Badariah Sahamid JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This is an appeal against the High Court's decision dated 27 October 2017 where the learned judge had allowed the applicant's ('Etiqa Takaful Bhd') application for a declaration that the contract of insurance through certificate No TGPC-PC 195025 ('the said policy') which covers a motorcar bearing registration number QAU 1314 for the period of 30 July 2012 to 29 July 2013 was void and unenforceable in respect of coverage of an accident which

allegedly occurred on 2 September 2012 between a motorcar bearing registration No QAU 1314 and a motorcycle bearing registration No QAR 2278.

**[2]** The learned judge further granted a declaration that the applicant is not responsible to comply with any orders following the civil action in the Sessions Court of Kota Samarahan Suit No KSN A53KJ-26/2 of 2016 and/or any other claims which arises from the road accident which allegedly occurred on 2 September 2012 between a motorcar bearing registration No QAU 1314 and a motorcycle bearing registration No QAR 2278.

**[3]** After the learned judge had granted the above-mentioned declarations against the first respondent ('Ambrose ak Jewon') on 30 August 2017, learned counsel for the second respondent ('Abuseman bin Jamaluddin') requested to make further submissions on the issue of whether the abovementioned declaratory order against the first respondent would disentitle the second respondent of his third party statutory rights under s 96(1) of the Road Transport Act 1987 ('the RTA 1987').

**[4]** On 27 October 2017, the learned judge maintained her earlier decision delivered on 30 August 2017 in respect of the declaration against the first respondent. The learned judge further declared that the applicant is not responsible to comply with any orders following the civil action pending in the sessions court and/or any other claims which arises from the road accident which allegedly occurred on 2 September 2012 between a motorcar bearing registration No QAU 1314 and a motorcycle bearing registration No QAR 2278.

**[5]** In this appeal by the second respondent against the applicant, the contention of the second respondent is that the learned judge had erred in declaring the said policy as void and/or unenforceable against the second respondent and the second respondent is disentitled to claim from the applicant any judgment following the civil action in the sessions court and/or any claims which arises from the alleged accident. Such a declaration would disentitle the second respondent of his third-party statutory rights under s 96(1) of the RTA 1987.

BACKGROUND FACTS

**[6]** The applicant is a company licensed under the Insurance Act 1966 to carry out the business of general insurance and is the insurer of the said policy in respect of a car bearing registration No QAU 1314.

**[7]** The first respondent is at all material times the registered owner and

driver of the motorcar bearing registration No QAU 1314, insured by the said policy which was issued by the applicant.

**[8]** The second respondent is the rider of the motorcycle bearing registration No QAR 2278, who had sustained severe injuries due to an accident involving the first respondent, which was alleged to have occurred on 2 September 2012.

**[9]** Subsequently, the second respondent had commenced a civil suit against the first respondent at the Sessions Court in Kota Samarahan to claim for general and special damages arising out of the alleged accident.

PROCEEDINGS AT THE HIGH COURT

**[10]** Meanwhile, while the sessions court suit was still ongoing, the applicant filed an originating summons in the High Court (encl 1) on 23 March 2017, which sought, inter alia, the following declarations:

(a) Contract of insurance through Certificate No TGPC-PC 195025-BRTQKVCH which covers a motorcar bearing registration number QAU1314 for the period of 30th July 2012 to 29th July 2013 is void and unenforceable to cover an accident which allegedly occurred on 2nd September 2012 between a motorcycle bearing registration No QAR 2278 and a motorcar bearing registration No QAU 1314;

(b) Furthermore, the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No KSN A53KJ-26/2-2016 and/or any other claims which arises from the road accident which allegedly occurred on 2.9.2012 between a motorcycle bearing registration No QAR 2278 and a motorcar bearing registration No QAU 1314.

**[11]** The grounds relied on by the applicant in encl 1 were as follows:

(a) failure to comply with the terms and conditions of the Insurance Certificate No TGPC-PC 195025-BRTQKVCH which are as follows:

(i) failure to notify the applicant of the said accident in accordance to the terms and conditions as stipulated within the said insurance policy;

(ii) failure to notify the police of the said accident in accordance to the terms and conditions as stipulated within the said insurance policy; and

(iii) entered negotiation with the third-party rider for the purpose of settlement without any written consent from the applicant.

**[12]** The relevant terms and conditions of the said policy relied on by the

applicant is reproduced as follows:

PRIVATE CAR CERTIFICATE

'All accidents must be reported to the Police within 24 hours'

CONDITIONS — THESE APPLY TO THE WHOLE CERTIFICATE

2. Accidents and Claims Procedures

(a) The insurer must be notified in writing or by phone in either case with particulars of the vehicles involved, date of accident and, if possible, a brief description of the circumstances of the accident within the specific time frame as follows after an event which may become the subject of a claim under this policy:-

(i) Within seven (7) days if the insured is not physically disabled and hospitalised as a result of the event.

(ii) Within thirty (30) days or as soon as practicable if the Insured is physically disabled and hospitalised as a result of the event.

(iii) Other than (i) and (ii), a longer notification period may be allowed subject to specific proof by the Insured.

...

...

(e) No negotiation, admission or repudiation of any claim may be entered without our prior written consent.

**[13]** The applicant contends that reading condition 2(a) together with condition 7(a) of the policy demonstrates that condition 2(a) is a condition precedent to any liability that may arise under the said policy. condition 7(a) of the said policy states:

7. Other matters

This Certificate will only be operative if:

(a) Any person claiming protection has complied with all its terms, Conditions, Endorsements, Clauses or Warranties.

## DECISION OF THE HIGH COURT

**[14]** The learned judge allowed encl 1 and held the said policy to be void and unenforceable for breach of conditions precedents in the said policy by the insured (first respondent). Her Ladyship had stated as follows (at para 35 of 'grounds of decision'):

In the light of the authorities cited above, (amongst them: *Chong Kok Hwa v Taisho Marine & Fire Insurance Co Ltd* [1977] 1 MLJ 244; *Anuar bin Ismail v Tan Sri Tan Chin Tuan & Anor* [1992] 1 MLJ 155, *Pioneer Concrete (UK) Ltd v National Employers Mutual General Insurance Association Ltd* [1985] 2 All ER 395; *Putra*

*Perdana Construction Sdn Bhd v AMI Insurance Bhd & Ors* [2005] 2 MLJ 123; [2004] 8 CLJ 538) failure on the part of the first respondent in notifying the applicant of the said accident within the stipulated period of seven days from the date of the accident is a breach of Condition 2(a) of the said Policy. Such breach when read with Condition 7(a) of the said Policy entitled the applicant to void the policy in respect of the claim.

**[15]** In addition, the learned judge (in para 67) also granted declaration (2) as per prayer 3 which reads as follows:

Furthermore, the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No: KSN A53KJ-26/2-2016 and/ or any other claims which arises from the road accident which allegedly occurred on 2.9.2012 which allegedly involved between a motorcycle bearing registration number of QAR 2278 and a motorcar bearing registration number of QAU 1314.

**[16]** As a consequence of the above, the learned judge held that the second respondent, a third party to the said policy is not entitled to claim against the applicant. Her Ladyship stated as follows (in para 68):

It is plain from the granting of declaration (2) that declaration (1) has disentitled the second respondent from claiming the judgment which may be made in the second respondent's favour in the SC Suit.

**[17]** In addition, the learned judge had considered s 96 RTA 1987, in particular sub-ss (1) and (3) and concluded that on satisfaction of the requirements under s 96(3) an insurer is entitled to avoid his liability against third parties who institute proceedings against the insurer pursuant to s 96(1) of the RTA 1987. Her Ladyship had stated (at para 53) as follows:

From my reading and understanding of plain language in section 96(3) of the RTA 1987, an insurer may void its liability under insurance policy to satisfy the judgment which a third party may obtain in actions involving the insured vehicles for as long as the insurer has fulfilled the two crucial pre-requisites and complied with the proviso of section 96(3) RTA. In other words, upon satisfying the same, section 96(3) RTA will act as a complete defence against any recovery proceedings by the third party under section 96(1) of the RTA 1987.

**[18]** In her 'grounds of decision', Her Ladyship had referred to the counter argument of learned counsel for the second respondent that s 94 of the RTA 1987 strictly prohibits an insurer from repudiating its liability to a third party on the premise of a breach of the contract of insurance pursuant to s 96(3) of the RTA 1987. However, Her Ladyship had declined to make any finding in respect of the above argument. The position taken by Her Ladyship was that since judgment to allow encl 1 had been pronounced on 30 August 2017 while submissions on the effect of s 94 of the RTA 1987 were made thereafter on 8

September 2017, she 'ought not reverse the judgment pronounced on 30th August 2017,' as Her Ladyship had made a final order and thus, the matter could not be re-opened for further consideration of s 94 of the RTA 1987.

**[19]** It is to be noted that the decision of the sessions court suit was still pending when the High Court delivered its decision on 27 October 2017. The decision in respect of the session court suit was delivered subsequently on 27 November 2017, wherein the sessions court judge held the first respondent ie Ambrose ak Jewon was wholly liable for causing the said accident.

*The second respondent's submissions*

**[20]** The second respondent relies on section 94 to be read with s 96(1) and (2) of the Road Transport Act 1987 ('the RTA 1987'). The primary grounds of appeal of the second respondent against the decision of the learned judge may be summarised as follows:

(a) the learned judge had erred in its decision in holding that the respondent ie ETIQA TAKAFUL BHD is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Writ No KSN-A53KJ-26/2 of 2016 and/or any other claims which arises from the road accident which occurred on 2 September 2012 involving a motorcycle bearing registration number QAR 2278 and a motorcar bearing registration number QAU 1314;

(b) the learned judge had erred in law and had misdirected herself when she failed to consider the provision of s 94 of the Road Transport Act 1987 ('RTA 1987') which disentitles the insurer ie the (first) respondent to obtain the said declaratory order against the second respondent;

(c) s 94 of the RTA 1987 provides that conditions in policy of insurance are deemed to be of no effect by operation of law in relation to the liability of the insurer to a third party, ie the second respondent. Section 94 was intended to prevent insurance companies from contracting out of the RTA 1987 by repudiation of liability to third parties on the grounds that the insured (first respondent) had breached the insurance policy;

(d) the second respondent's statutory rights under s 96(1) of the RTA 1987 should be fully preserved notwithstanding the declaratory order against the first respondent;

(e) the second respondent had subsequently obtained a judgment against the first respondent in the sessions court suit on 27 November 2017 whereby the first respondent was held to be wholly liable for causing the said accident. In the circumstances, the second respondent can proceed to execute his rights under s 96(1) of the RTA 1987 and claim against the insurer, Etiqa Takaful Bhd (applicant); and

(f) s 94 of the RTA 1987 enables the applicant to enforce a policy provision to recover from the first respondent any sums which the applicant may have had to pay to the second respondent.

GROUNDS OF APPEAL

*The applicant's submissions*

**[21]** Learned counsel for the applicant took the position that the applicant is lawfully entitled to avoid the said policy and/or any relevant claim made in respect thereof. Thus, the said policy is void and unenforceable against the insured (the first respondent) as well as any third party claiming thereunder (in this case, the second respondent) on the following grounds:

(a) the first respondent had breached condition 2(a) of the said policy in his failure to notify the applicant of the said alleged accident within the stipulated period of seven days from the alleged accident, which allegedly occurred on 2 September 2012;

(b) the first respondent had also breached condition 2(e) of the said policy by entering into negotiation with the third party without the prior written consent of the applicant;

(c) the first respondent had breached condition 7(a) of the said policy which is a condition precedent to the operation of the said policy by failing to comply with all the terms, conditions, endorsements, clauses or warranties of the said policy;

(d) pursuant to s 96(3) of the RTA 1987, where the insurer has obtained a declaration from a court that the insurance was void or unenforceable, the insurer is not liable to pay as the insurer is entitled to the benefit of the declaration obtained (*Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218; *Jayakumar Rajoo Mohamad v CIMB Aviva Takaful Bhd* [2015] 6 MLJ 437; [2015] 9 CLJ 552). Thus, the applicant is not liable to pay for any judgment sum following the sessions court suit and/or any other claims which arises from the said alleged accident in view that the said policy had been declared void and unenforceable by the High Court.

(e) the second respondent is disentitled to claim from the applicant because s 96(3) of the RTA 1987 is an express statutory exception to the statutory liability of an insurer under s 96(1) of the RTA 1987;

(f) the second respondent's statutory rights and interest under s 96(1) and (3) of the RTA 1987 has yet to crystallised and/or were enforceable as against the applicant as the second respondent had yet to prove his claim and/or to obtain a judgment in the session court suit when the applicant filed the originating summons in the High Court;

(g) the second respondent's appeal premised on s 94 of the RTA 1987 ought to be disregarded as the originating summons had already been granted by the High Court judge in favour of the applicant when arguments based on s 94 were raised. The learned judge was right to disregard the second respondent's submissions on s 94 of the RTA 1987; and

(h) thus, the applicant is entitled under the law to a declaration that the said policy is void and/or unenforceable against the second respondent.

OUR DECISION

**[22]** After careful consideration of learned counsels' oral and written submissions, the appeal records and in particular, relevant sections of the RTA 1987, we are of the considered view that there are merits in the second respondent's appeal that warrant appellate intervention. We therefore allowed the appeal and set aside the order of the High Court in respect of the second respondent with costs. The grounds of our decision are stated below.

**[23]** The learned judge had allowed the applicant's prayer for a declaration that the said policy was void and unenforceable against the insured (first respondent) for breach of conditions stipulated in the said policy. In this respect we affirmed the decision of the learned judge and dismissed the appeal of the first respondent. This appeal before us in respect of the second respondent, the third party against the applicant.

**[24]** The crux of this appeal is premised on the statutory interpretation of relevant sections of the RTA 1987, in particular where it relates to third parties to an insurance contract, as is the case of the second respondent in this appeal. The gist of the contention of the second respondent is that s 96 of the RTA 1987 should be read with s 94 of the RTA 1987. Section 94 in effect renders any condition excluding insurers from liability under the policy to third parties to be inoperative. Such a reading, it was further submitted, would enforce the spirit of the RTA 1987 which is essentially a social legislation which seeks to preserve the rights of third parties in the event that a policy is repudiated by an insurer due to breaches of the policy by the insured. Any such breach or breaches of the insurance contract by the insured (the first respondent) can only be grounds for repudiation inter partes against the insured but is inoperative against any third parties as expressly stipulated in s 94 of the RTA 1987.

**[25]** It is trite that points of law may be raised at any time. Thus we are of the view that it is entirely proper that arguments on s 94 of the RTA 1987 be considered in this appeal before us, even if they were only raised very late in the day by the second respondent's counsel, and were disregarded by the learned judge as Her Ladyship had by then already delivered her decision on encl 1 and

felt herself bound to adhere to her earlier decision.

**[26]** The applicant had placed reliance on section 96 of the RTA 1987, in particular sub-ss (1) and (3) to repudiate liability under the contract of insurance in respect of the insured (first respondent) as well as the third party (second respondent). Section 96 is reproduced below:

> 96 *Duty of insurers to satisfy judgments against persons insured in respect of third party risks*
>
> (1) If, after a certificate of insurance has been delivered under subsection 91(4) to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph 91(1)(b) (being a liability covered by the terms of the policy) is given against any person insured by the policy, *then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer shall, subject to this section, pay to the persons entitled to the benefit of the judgment any sum payable in respect of the liability*, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments.
>
> (2) ...
>
> (3) *No sum shall be payable by an insurer under subsection (1) if before the date the liability was incurred, the insurer had obtained a declaration from a court that the insurance was void or unenforceable;*
>
> Provided that an insurer who has obtained such a declaration as aforesaid in an action shall not become entitled to the benefit of this subsection as respect any judgment obtained in proceedings commenced before the commencement of that action unless, before or within seven days after the commencement of that action, he has given notice to the person who is the plaintiff in the said proceedings specifying the grounds on which he proposes to reply, and any person to whom notice of such an action is so given shall be entitled if he thinks fit to be made a party thereto. (Emphasis added.)

**[27]** From a plain reading of s 96(1) and (3) of the RTA 1987, we agree with the interpretation of the learned judge that s 96(1) provides statutory recognition of the preservation of third party rights notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the insurance policy. The insurer is therefore legally bound to satisfy any judgment sum in respect of liability upon being served with a certificate of insurance under sub-s (4) of s 91 RTA 1987.

**[28]** Section 96(3) however, expressly exempts the liability of the insurer to pay pursuant to s 96(1) of the RTA 1987, 'if *before the date the liability was incurred the insurer had obtained a declaration from a court that the insurance was void or unenforceable'.* The insurer's entitlement to seek a declaration under s 96(3) of the RTA 1987 to avoid or cancel insurance policies has been duly

recognised and endorsed by the Court of Appeal in the following recent cases: see *Pacific & Orient Insurance Co Bhd v Kamacheh a/p Karuppen* [2015] 4 MLJ 218; *Ahmad Nadzrin bin Abd Halim & Anor v Allianz General Insurance Co (M) Bhd* [2015] 6 MLJ 223; *Jayakumar Rajoo Mohamad v CIMB Aviva Takaful Bhd* [2015] 6 MLJ 437; [2015] 9 CLJ 552.

**[29]** The learned judge took the position that since Her Ladyship had granted the declaration sought for by the applicant in encl 1 to avoid liability to the insured (first respondent) under the said policy, in consequence thereof, sub-s (3) of s 96 of the RTA 1987 can be invoked to exempt the applicant from liability to any other party, including the second respondent.

**[30]** While the learned judge was correct in her interpretation of s 96(1) and (3) of the RTA 1987, Her Ladyship had erred in her construction of the said section on a stand-alone basis and without giving due consideration to how s 94 of the RTA 1987 would impact s 96 RTA 1987. To be fair, Her Ladyship felt legally bound not to consider s 94 RTA 1987 on the premise of her earlier decision to grant the declaration sought by the applicant.

**[31]** We are of the considered view that s 96 of the RTA 1987 must be read together with s 94 of the RTA 1987 as it is trite that the Legislator does not expressly lay down provisions in vain. In addition, there is no express provision to stipulate that s 94 is subject to s 96 of the RTA 1987.

**[32]** Section 94 of the RTA 1987 is reproduced below:

> 94 *Certain conditions in policies or securities to be of no effect*
>
> *Any condition in a policy or security issued or given for the purposes of this Part providing that no liability shall arise under the policy or security or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy or security shall be of no effect in connection with such claims as are mentioned in paragraph 91 (1) (b)*
>
> Provided that nothing in this section shall be taken to render void any provision in a policy or security requiring the person insured or secured to repay to the insurer or the giver of the security any sums which the latter may have become liable to pay under the policy or security and which have been applied to the satisfaction of the claims of third parties. (Emphasis added.)

**[33]** The above s 94 refers to claims mentioned in para 91(1)(b) which reads as follows:

> 91 *Requirements in respect of policies*
>
> (1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which —

(a) ...

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of or bodily injury to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.

**[34]** The effect of s 96 read with s 94 of the RTA 1987 has been considered and pronounced in the following cases. In the case of *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165, the Supreme Court endorsed the view that the underlying purpose of compulsory motor insurance against third party risks was to ensure that innocent third parties who were injured in vehicular accidents were given full and effective protection, regardless of the private insurance arrangement between the insurer and the insured.

**[35]** One of the issues raised before the Supreme Court in *Malaysian National Insurance* was whether s 80 of the Road Traffic Ordinance 1958 limits the liability of an insurer to pay to an injured third party an amount equal to the proportionate liability of the policy holder (insured)? Edgar Joseph Jr FCJ had considered the effect of s 80(4) — now s 96(4) of the RTA 1987 and stated as follows:

One effect of s 80(4) of the Ordinance is that since liability of insurers against third party risks under s 80(1) is unlimited, any kind of limitation, whether stipulating that the insured has to pay the first X RM of any liability or that the insurance company would not pay more than Y RM of any liability, or by means of a rateable contribution clause, would be void and ineffective as against a third party who can recover the full amount from the insurance company. But the insurance company may have a right of recovery of any excess from its insured. However, it could be objected that such a policy does not comply with the requirements of s 75(1) of the Ordinance (equivalent to s 9 (1) of the Act).

Section 80(4) also contemplates a situation where the policy is voidable at common law on the ground of non-disclosure or misrepresentation of material facts and the insurance company has not taken the necessary steps under s 80(3) to obtain a declaration as to non-liability on this ground in time or at all or if the policy is voidable, under a condition of the policy. In such a situation, the insurance company would still be legally obliged to pay a third party in enforcement proceedings brought under s 80(1) but it has a right of recovery against its insured.

... To recapitulate, as *the language of s 80(1) expressly directs attention to the liability covered by 'the terms of the policy', in construing the subsection it is necessary to have regard to the terms of the policy* (see Bankers 7 Traders Insurance Co. Ltd v National Insurance Co Ltd, per Lord Scarman), *subject to the statutory provisions rendering certain conditions or restrictions of no effect against third parties) (see ss 78 and 79 of the Ordinance-now ss 94 and 95 of the Act and derived from s38 of the UK Road Traffic Act 1930 and s 12 of the UK Road Traffic Act 1934).* (Emphasis added.)

**[36]** In the recent decision of *Muhamad Haqimie bin Hasim & Anor v Pacific & Orient Insurance Co Bhd* [2018] MLJU 629, the Court of Appeal had occasion to consider the effect of, inter alia, s 94 of the RTA 1987, in circumstances where the registered owner of the insured vehicle had sold the vehicle to another person, although the insured's name remained on the registration card as the legal owner of the vehicle. The Court of Appeal held the registered owner remains the insured for the purposes of the accident and that the insurer is liable to compensate the plaintiffs for any injuries suffered as a consequence of the accident. The Court of Appeal had stated as follows:

> ... (vi) We are fortified in our decision by s 94 and 95 of the RTA which provide that conditions in a policy of insurance are deemed to be of no effect, again by operation of law, in relation to liability of insurers to third parties.
>
> (vii) Section 94 provides that any condition in a policy issued providing that no liability shall arise under that policy or that any liability so arising shall cease in the event of some specified thing being done or omitted to be done after the happening of the event giving rise to a claim under the policy shall be of no effect in connection with claims under s 91(1)(b).
>
> (viii) Section 91(1)(b) relates to third party claims such as the present.

**[37]** In view of the above, s 94 of the RTA 1987 strictly prohibits the applicant, Etiqa Takaful from repudiating its liability to the second respondent on the grounds that the insured (first respondent) had breached specific conditions of the insurance policy. Consequently, the second respondent can proceed to execute his rights under s 96(1) of the RTA 1987 and claim against the applicant. Thus the second respondent's statutory rights under s 96(1) of the RTA 1987 is fully preserved notwithstanding the declaratory order of the High Court against the first respondent.

**[38]** In conclusion, we are of the considered view that the learned judge had erred in law in her failure to consider the provision of s 94 of the RTA 1987 which disentitles the applicant insurer, Etiqa Takaful from obtaining the benefit of the said declaration order against the second respondent. We therefore allow the appeal of the second respondent and set aside the order of the High Court in respect of the declaration that:

> ... the applicant is not responsible to comply with any orders following the civil court action in the Sessions Court of Kota Samarahan Suit No: KSN A53KJ-26/2-2016 and/ or any other claims which arises from the road accident which allegedly occurred on 2.9.2012 which allegedly involved between a motorcycle bearing registration number of QAR 2278 and a motorcar bearing registration number of QAU 1314.

**[39]** We therefore allowed the second respondent's appeal with costs of

RM5,000 to the appellant subject to allocator. Deposit to be refunded to the appellant.

*Appeal allowed and order of High Court set aside.*

Reported by Nabilah Syahida Abdullah Salleh